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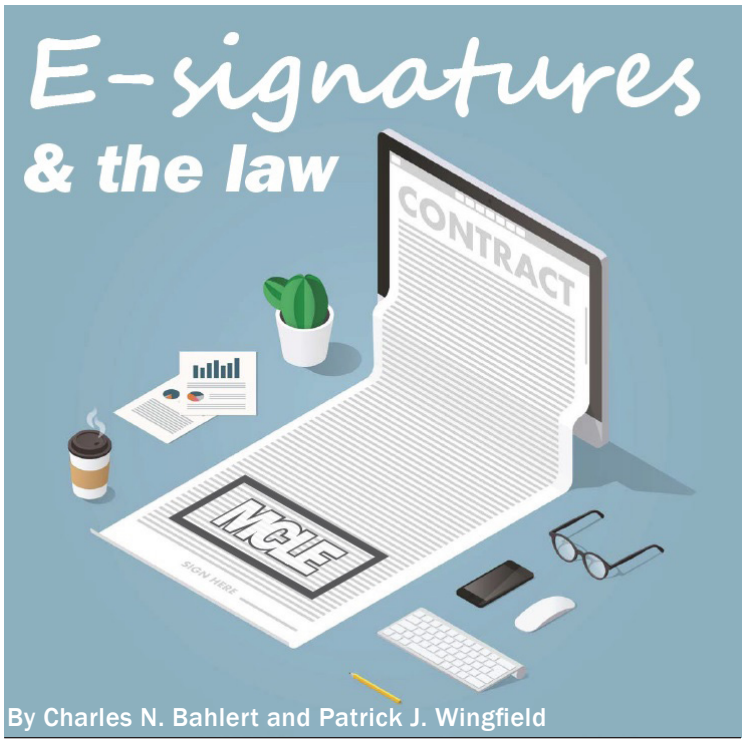
PERSPECTIVE



By Charles N. Bahlert and Patrick J. Wingfield

We are living in the Information Age, where technologies continuously and rapidly evolve and the law struggles — and often fails — to keep up. An example of this tension between digital transformation and legal doctrine is the means by which people execute written agreements. While "wet signatures" may still be used on occasion, people frequently enter into agreements using electronic signatures by necessity or convenience. But what is an "electronic signature," and is it enforceable in a court of law?

This article examines California's e-signature law, the California Uniform Electronic Transaction Act, and the impact it has on the enforceability of agreements executed using an electronic signature. The article first outlines the statutory authority and requirements to effectively execute an agreement using an electronic signature. The article then fleshes out these statutory requirements by examining three recent cases that analyzed the enforceability of agreements purportedly entered into through the use of electronic signatures. Finally, the article provides sample language that can be used as a prophylactic measure to protect against unnecessary disputes concerning the enforceability of an electronic signature by requiring each party to exchange a wet signature.

THE E-SIGN ACT AND CUETA

In 2000, the United States enacted a law permitting electronic signatures of contracts known as the Electronic Signatures in Global and National Commerce Act, aka the E-SIGN Act. California, likewise, has its own e-signature law known as the California Uniform Electronic Transaction Act, or CUETA, which can be found at Civil Code Sections 1633.1, et seq. The E-Sign Act and CUETA both provide that agreements may not be denied legal effect because they are in electronic form or have electronic signatures. Specifically, Section 1633.7 of the CUETA states: "(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form. (b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. (c) If a law requires a record to be in writing, an electronic record satisfies the law. (d) If a law requires a signature, an electronic signature satisfies the law." Section 1633.13 further provides that "[i]n a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form."

Three key provisions within CUETA to be familiar with include the following. First, the term "electronic signature" is defined to mean "an electronic sound, symbol or process attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the electronic record." Civ. Code Section 1633.2(h). Second, to be enforceable, the parties must have "agreed to conduct the transaction by electronic means." Civ. Code Section 1633.5(b). Whether the parties agreed to conduct a transaction by electronic means is "determined from the context of and surrounding circumstances, including the parties' conduct." Civ. Code Section 1633(d). Furthermore, an agreement to conduct the transaction electronically may not be in a standard form contract unless the standard form contract is "separate and optional" with its "primary purpose" being "to authorize a transaction to be conducted by electronic means." Civ. Code Section 1633.5(b). Third, "an electronic record or "electronic signature" must be "attributable to a person." Civ. Code Section 1633.9(a). Section 1633.9 explains that the act of a person "may be shown in any manner, including showing of the efficacy of any security procedure applies to determine the person to which the electronic record or electronic signature was attributable."

The E-Sign Act and CUETA have several exceptions that must be kept in mind. Most notably, the E-Sign Act and CUETA do not apply to a contract or other record that is governed by: (1) a statute, regulation or other rule of law governing the creation and execution of wills, codicils or testamentary trusts (Civ. Code Section 1633.3(b), (c)); (2) a statute, regulation or other rule of law governing adoptions, divorce or other matters of family law; or (3) the Uniform Commercial Code. 15 U.S.C. Section 7001, 7003(a); Civ. Code Section 1633.3(b), (c).

RECENT CASE LAW

Three recent cases help illustrate how courts apply CUETA. The first case addresses CUETA's first and second requirements — whether the person executed or adopted the electronic signature with the intent to sign and whether the parties agreed to conduct a transaction by electronic means. In *J.B.B. Inv. Partners, Ltd. v. Fair*, the California Court of Appeal reversed the trial court and held that a typed name at the end of an email was not an enforceable electronic signature to execute a settlement agreement. 232 Cal. App. 4th 974 (2014). In *J.B.B.*, investors alleged the investment company founder made fraudulent representations and omissions relating to the business. During settlement negotiations, the parties exchanged email correspondence where the founder purportedly agreed to the investors' proposed settlement terms. The founder subsequently denied that an agreement was reached, and the investors sought to enforce the settlement.

The trial court concluded that a settlement agreement was reached based on evidence that the parties agreed to negotiate the terms of the settlement by email and that the founder had in fact typed his name at the bottom of the email. The appellate court, however, found the trial court's analysis incomplete because it failed to analyze whether (1) the parties agreed to conduct the transaction by electronic means and (2) the signer intended to sign the electronic record.

Upon review of the record, the appellate court determined that these two elements were not satisfied primarily due to the fact that the first settlement offer "did not contain any statement indicating that the parties agreed to enter into a final settlement by electronic means. The plain language of the July 4 offer made it clear that no signature was being requested as the offer included no signature

E-signatures: Law attempts to keep up with the information age

line or signature block, contained no signature by any of the plaintiffs, and advised that future paperwork was forthcoming."

In contrast, a later proposed agreement (which the founder refused to sign and led to the settlement enforcement proceedings) contained elements that the appellate court suggested would satisfy CUETA's first two requirements:

"[T]he July 11 writing included a signature line at the end of the settlement agreement. Additionally, it specified that an electronic signature could be used. The July 11 writing provided: 'This Settlement Agreement may be signed and delivered by facsimile and in counter-parts. It may also be electronically signed by each of the Parties through the use of EchoSign, DocuSign, or such other commercially available electronic signature software which results in confirmed signatures delivered electronically to each of the Parties, which shall be treated as an original as though in-signed by officers or other duly authorized representatives of each Party.' No similar language was in the July 4 offer and, as already stressed, the July 4 offer did not indicate that a printed name at the bottom of an e-mail would be an electronic signature."

Accordingly, without these necessary elements, the founder's name at the bottom of the email was not an "electronic signature" within the meaning of CUETA.

Two subsequent cases help flesh out the third requirement that the electronic signature must be authenticated or deemed "attributable to a person" as required by Section 1633.9(a). In *Ruiz v. Moss Bros. Auto Group, Inc.*, the California Court of Appeal upheld the trial court's finding that the employer seeking enforcement of an arbitration agreement against its employee had failed to authenticate the employee's signature. 232 Cal. App. 4th 836 (2014). In support of its initial motion, the employer provided declaration testimony that only "summarily asserted" that the employee was the person who signed the agreement. The court noted that the employer did not explain "how [the former employee's] printed electronic signature, or the date and time printed next to the signature, came to be placed on the 2011 agreement" or how it "ascertained that the electronic signature on the ... agreement was 'the act of' [the former employee]." (Citing Cal. Civ. Code Section 1633.9.)

The court outlined examples of what the employer could have done to explain how the electronic signature on the arbitration agreement was an "act attributable" to the employee: "Indeed, [the Employer's business manager] did not explain that an electronic signature in the [employee's name] could only have been placed on the 2011 agreement ... by a person using [the employee's] 'unique login ID and password'; that the date and time printed next to the electronic signature indicated the date and time the electronic signature was made; that all [] employees were required to use their unique login ID and password when they logged into the HR system and signed electronic forms and agreements; and the electronic signature on the 2011 agreement was, therefore, apparently made by [the employee] on September 21, 2011, at 11:47 a.m. Rather than offer this or any other explanation of how she inferred the electronic signature on the 2011 agreement was the act of [the employee], [the business manager] only offered her unsupported assertion that [the employee] was the person who electronically signed the 2011 agreement. In the face of [the employee's] failure to recall electronically signing the 2011 agreement, the fact the 2011 agreement had an electronic signature on it in the name of [the employee], and a date and time stamp for the signature, was insufficient to support a finding that the electronic signature was, in fact, 'the act of' [the employee]." (Citing Cal. Civ. Code Section 1633.9(a).)

The California Court of Appeal reached the opposite conclusion in *Espejo v. Southern California Permanente Medical Group*, a case involving an employment dispute and demand for arbitration by the employer similar to *Ruiz*. 246 Cal. App. 4th 1047 (2016). The court found that unlike *Ruiz*, the employer in *Espejo* provided sufficient evidence to authenticate the document and establish that the electronic signature was "the act of" the employee. Specifically, the employer's IT/systems consultant provided a detailed declaration outlining the employer's security precautions regarding transmission and use of an applicant's unique username and password, as well as the steps an applicant would have to take to place his name on the signature line of the employment agreement.

The systems consultant concluded that based on this procedure, the employer's name "'could have only been placed on the signature pages of the employment agreement ... by someone using [the employee's] unique user name and password. ... [¶] Given this process for signing documents and protecting the privacy of the information with unique and private user names and passwords, the electronic signature was made by [the employee]' on the employment agreement ... at the date, time, and IP address listed on the documents." This evidence, the California Court of Appeal concluded, was sufficient to authenticate the document and establish that the electronic signature was attributable to the employee.

SAMPLE CLAUSES

Regardless of whether the electronic signature is valid and enforceable, parties may avoid unnecessary disputes concerning the enforceability of an electronic signature as a matter of conservative practice by requiring each party to exchange a wet signature (in addition to its e-signature) within a certain period (e.g., 30 days) following the mutual execution of the contract. Sample language practitioners use to achieve this objective is as follows:

Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Counterparts may be delivered via facsimile, electronic mail (including pdf or any electronic signature complying with the U.S. federal ESIGN Act of 2000, California's Uniform Electronic Transactions Act (Cal. Civ. Code § 1633.1, et seq.) or other applicable law) or other transmission method, and any counterpart so delivered shall be deemed to have been duly and validly delivered and be valid and effective for all purposes. With respect to signatures delivered via facsimile or electronically, each Party shall deliver their original ink signatures to the other Party within 30 days following the mutual execution of this Agreement, provided, that failure to deliver such original ink signatures shall not affect the validity of the electronic signatures that were delivered.

CONCLUSION

CUETA and its case law provides us with guidance as to how to effectively use an electronic signature in today's digital world. In sum, three requirements must be satisfied: (1) The electronic signature must be executed or adopted by a person with the intent to sign the electronic record; (2) the parties must have "agreed to conduct the transaction by electronic means"; and (3) the electronic signature must be properly authenticated so as to ensure it was an "act attributable" to the person. If these necessary steps are followed, an electronic signature will have the same force and effect as the traditional wet signature in California courts.

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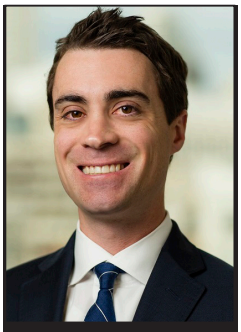
BAHLERT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1. This year, the U.S. finally enacted a law permitting electronic signatures of contracts.

True ❑ False ❑

2. California law states that a contract may not be denied legal effect solely because an electronic record was used it its formation.

True ❑ False ❑

3. However, if a California law specifically requires a signature, an e-signature will not suffice.

True ❑ False ❑

4. In California, to be enforceable, the parties must have agreed to conduct a transaction by electronic means.

True ❑ False ❑

5. Parties must expressly state that they intend to conduct a transaction by electronic means for it to be enforceable.

True ❑ False ❑

6. An electronic signature need not be attributable to a specific person.

True ❑ False ❑

7. CUETA applies to contracts involving the formation of wills and trusts.

True ❑ False ❑

8. The E-Sign Act applies to contracts governed by the Uniform Commercial Code.

True ❑ False ❑

9. CUETA applies to divorce contracts.

True ❑ False ❑

10. The California Court of Appeal said that a name typed at the bottom of an email is a clear indication of a willingness to conduct a transaction by electronic means.

True ❑ False ❑

11. To determine the existence of a valid contract containing an electronic signature, courts should evaluate whether the signer intended to sign the contract.

True ❑ False ❑

12. Declaration testimony that summarily asserts that an employee was the person who signed an agreement is sufficient to attribute a signature to a specific person.

True ❑ False ❑

13. Generally, three requirements must be satisfied to enforce a contract signed electronically: intent, agreement to transact electronically, and attribution.

True ❑ False ❑

14. In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.

True ❑ False ❑

15. An electronic signature might be an electronic sound associated with an electronic record.

True ❑ False ❑

16. An agreement to conduct the transaction electronically may not be in a standard form contract unless the standard form contract is separate and optional with its primary purpose being to authorize a transaction to be conducted by electronic means.

True ❑ False ❑

17. CUETA applies to adoption contracts.

True ❑ False ❑

18. An electronic signature may be attributed to a person by demonstrating the efficacy of security procedures related to accessing a document.

True ❑ False ❑

19. In *Espejo*, the court said a systems consultant's detailed declaration was sufficient to attribute a signature to an employee.

True ❑ False ❑

20. Requiring the exchange of a wet signature within a certain period can help to avoid unnecessary disputes concerning the enforceability of an electronic transaction.

True ❑ False ❑

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